S. Scott Bowser v. U.S. General Accounting Office

Docket No. 06-200-17-81

Date of Decision: February 23, 1982

Cite as: Bowser v. GAO (2/23/82)

Before: Gallas, Chair; Bussey, Simmelkjaer, and Taylor, Members

Disparate Treatment Standard of Proof

RECONSIDERATION of Bowser v. GAO,. M4. (September 30, 1981)

Background

A panel of three Board Members issued the initial decision in this case on September 30, 1981. On November 3, 1981, the Board's General Counsel filed a Motion to Reopen and Reconsider the Panel Decision. The General Accounting Office (hereinafter referred to as "Respondent") replied in a Memorandum of Law dated November 24, 1981. The Board's General Counsel then responded with additional arguments addressing the Respondent's Memorandum. On January 12, 1982, the entire Board heard oral arguments from legal representatives of both sides in the Board's Hearing Room at the GAO Building.

Contentions of the Parties

In the simplest terms, the General Counsel contends that the Panel Decision in this case incorrectly articulated the evidentiary standard applicable to discrimination cases as originally articulated by the United States Supreme Court in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In light of the alleged erroneous articulation and application of that evidentiary standard to this case, the Board's General Counsel argues that the Petitioner was erroneously denied relief.

The Respondent, by counsel, contends that the Petitioner did not make out a prima facie case and therefore relief should be denied.

Analysis

The contentions of the parties and the evidence and case law in support of those arguments have been fully aired in the form of legal memoranda and oral argument. Therefore, the Board will limit its discussion to a precise articulation of the applicable evidentiary standards and the application of those standards to the facts of this case.

The Supreme Court's standards as set forth in McDonnell Douglas Corp. v. Green, supra, was recently reaffirmed by the Court in Texas Department of Community Affairs v. Burdine, 25 FEP Cases 113, 115 (1981), as follows:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." ... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

According to both cases, to satisfy the initial burden, the Petitioner must show four things:

(1) That Petitioner belongs to a protected class or group, e.g., racial minority;

(2) That Petitioner applied for and was qualified for a job for which the Respondent was seeking applicants;

(3) That despite Petitioner's qualifications, the Petitioner was rejected for the position; and

(4) That after the Petitioner's rejection, the position remained open and the Respondent continued to seek applicants from persons of Petitioner's qualifications.

In discrimination cases premised on non-promotions, the fourth prong of the initial or prima facie burden must be restructured somewhat. The Supreme Court was faced with this problem in Burdine, supra, a discrimination case involving the plaintiff's nonselection for a promotion. There, the Court expressed the prima facie burden of the plaintiff as follows:

"The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."

Burdine, supra at 115.

Nevertheless, the Court did not explain how the fourth prong of the prima facie test is to be formulated in a discrimination case involving a promotion. Many of the twelve Federal judicial circuits have also wrestled with this problem. For example, in Hagans v. Andrus, 25 FEP Cases 502 (9th Cir. 1981), the Court stated at 505-506 of the Opinion that the Court must:

"...determine whether the evidence is sufficient to create an inference that sex was 'the likely reason for the denial of [the] job opportunity.' ...If the evidence is sufficient to create such an inference, the district judge must then permit the government to go forward with its case. If the evidence is not sufficient to create such an inference, the district judge must dismiss the case."

Hagans v. Andrus, supra, is also instructive on another issue involved in this case: Is this a disparate treatment or a disparate impact case? At footnote 1, at page 504 of the Decision, the Ninth Circuit differentiates between the two by defining a disparate impact case as one involving employment practices that are facially neutral in their treatment of different groups, but which fall more harshly on one group

than another and cannot be justified by business necessity, while disparate treatment cases involve different treatment of individuals by an employer primarily or solely because of their race, color, religion, sex, or national origin. In the instant case, the Petitioner has clearly alleged disparate treatment as opposed to disparate impact.

In oral argument, counsel for the Respondent did cite a recent case from the District of Columbia Circuit which it contends correctly and satisfactorily addresses the issue of the proper articulation of the fourth prong of the prima facie test in a promotion case. That case, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), at 951, articulates the fourth prong in promotion cases as follows:

"Adjusting the McDonnell formula to cases of discriminatory refusal to promote is relatively simple. Thus to make out a prima facie case the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied."

At least one other Circuit, the Eighth Circuit, has adopted this articulation of the fourth prong, the prima facie test, in a promotion case: Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981). See also, Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012 (D.C. Cir. 1981), and Dave v. Harris, 655 F.2d 258 (D.C. Cir. 1981). After a review of these and other cases cited by both parties and after considering oral argument, the Board adopts the quoted articulation from the Bundy, supra, decision as the correct articulation of the fourth prong of the prima facie test in a promotion case.

Accordingly, having adopted the Bundy v. Jackson, supra, standard for application in this case, the Board must evaluate the evidentiary record to determine whether other employees of similar qualifications who are not members of the Petitioner's protected group, i.e., Black, were promoted at the time Petitioner's request for promotion was denied. A total of 25 promotion cases were placed on the record in this case. Since 23 of these examples, which were cited by the Deputy Director for Personnel of the Respondent, were competitive promotions, they are inapplicable to this case. The remaining two examples were noncompetitive or lateral promotions, cited by the Civil Rights Office and discussed at length by both sides of this case.

In the first example cited, an employee was transferred to the Respondent agency before that individual completed one year in grade, i.e., before that person's anniversary date for promotion purposes. During the interview, that person was advised that they would be promoted on their anniversary date if performing at the appropriate higher grade level. Although the employee requested promotion on his anniversary date, he was denied promotion for an additional four plus months. A precise explanation was provided as to why that individual had not been promoted, however. Specifically, the employee had been assigned a major project upon transfer to the Respondent agency and was advised that upon completion of that project, his promotion would be approved without delay. Apparently, shortly after completion of the project, the individual was so promoted.

The second example cited involved an individual who was also transferred to the Respondent agency from another agency. This individual, however, was hired after having completed one year in grade. Apparently, that individual was told during the interview that he would be eligible for promotion after successful completion of an initial 90-day evaluation period. After the individual transferred to the Respondent agency and completed the 90-day period, his promotion was approved.

The only additional evidence offered in this regard was the testimony of a Personnel Specialist within the Personnel Division of the Respondent agency, who testified that it was the practice of other supervisors in the Personnel Division where the Petitioner was employed to promote qualified individuals on or about their anniversary date. However, no actual examples were offered by the Personnel Specialist to support his bare assertion that such a practice existed within the Personnel Division to demonstrate that other employees within the Personnel Division with qualifications similar to the Petitioner and not of his protected class, were promoted on or shortly after their anniversary date.

While Respondent contends that only evidence of such promotions to the GS-13 grade level would constitute promotions of other employees with similar qualifications, as opposed to promotions noncompetitively to the GS-12 level, nevertheless, in the absence of any evidence of promotions noncompetitively within the Personnel Division to either the GS-12 or GS-13 level, the Board is unable to determine that other employees of similar qualifications who are not members of the Petitioner's protected class were indeed promoted while at the same time the Petitioner's request for promotion was denied. Accordingly, the Board finds that the Petitioner has failed to satisfy the fourth prong of the prima facie case as articulated in McDonnell Douglas, Burdine, and Bundy, supra.

Since the Petitioner has failed to make out a prima facie case under the cited decisions, the Board is constrained to conclude that the Panel Decision in this case was correctly decided on the facts, even though the evidentiary standard of McDonnell Douglas was not correctly articulated in that decision.

Decision

The Board, having considered the Petitioner's Motion to Reopen and Reconsider the Board's initial decision in Bowser v. GAO, M4 (September 30, 1981), and, based on the foregoing analysis, affirms its original decision. Accordingly, the Petitioner is denied relief in this case. The Petitioner may appeal this decision to the United States Court of Appeals in which the Petitioner resides, or to the United States Court of Appeals for the District of Columbia within 30 days of receipt of notice of this final decision by the Board. Alternatively, the Petitioner may seek a trial de novo by appealing this decision to the appropriate United States District Court, pursuant to Title VII of the Civil Rights Act of 1964, as amended, within 30 days of receipt of notice of this final decision by the Board.